United States Court of Appeals

for the Second Circuit

APPELLEE'S APPENDIX

75-7213

75-7213

75-7213

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUIS FUENTES,

Plaintiff-Appellant,

-against-

ADOLPH ROHER, RICHARD LEE PRICE, JEROME GOODMAN, MARTIN RUBIN, SAUL MILDWORN, DONALD S. BROWN, LYLE BROWN,

Defendants-Appellees

GEORGINA HOGGARD, HENRY RAMOS, CARMEN BARRETO, JANICE WONG, CAROLYN KOZLOWSKY,

Defendants-Appellants.

DEFENDANT-APPELLEES' APPENDIX

W. BERNARD RICHLAND
Corporation Counsel
Municipal Building
1 Centre Street
New York, New York 10007
(212) 566-2192/3

Attorney for
Defendant-Appellees

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P/S

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DEFENDANT - APPELLEES'

APPENDIX

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FOR THE SOUTHERN DISTRICT OF NEW YORK

LUIS FUENTES,

Plaintiff,

-against-

ADOLPH ROHER, et al,

Defendants.

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73 Civ. 5455 (CES)

ORDER TO SHOW CAUSE ON A MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND ON A MOTION TO FILE SUPPLEMENTAL PLEADINGS

Upon the reading of the affidavits of Luis Fuentes and all papers filed herein and for good cause shown it is

ORDERED that defendants show cause ~~in room~~ before Hon. Charles E. Wyzanski, Jr. of the United States Courthouse, Foley Square, New York, on August 26, 1974, 2:30 ~~A.M./P.M.~~ why an order should not be issued pursuant to Rules 15(d) and 65 of the Federal Rules of Civil Procedure:

1. allowing plaintiff to file supplemental pleadings;

2. preliminarily enjoining and restraining defendants, their agents, employees, and attorneys and those acting in concert with them from:

a) suspending or dismissing plaintiff on the basis of the August 8, 1974 charges;

b) interfering with or penalizing plaintiff's right to free speech, association or political expression; and

c) interfering with plaintiff in the performance of his duties in accordance with the terms of his contract and the New York State Education Law.

and his rights pursuant to his contract [illegible]
Education Law; and that unless the plaintiff is restored to
his position as Community Superintendent he will suffer
immediate and irreparable harm; and so that the peace and
welfare of the Community and the education of the children
of District One, can be maintained; and that counsel for
plaintiff have notified counsel for defendants of this
application, it is

ORDERED that pending hearing and determination of
the motions, the defendants, their agents, employees and
attorneys and all persons in active concert with them be and
hereby enjoined to restore plaintiff to his rightful position
as Community Superintendent, and it is

FURTHER ORDERED that service of this order and
supporting papers shall be sufficient if made personally on
defendants counsel on or before 10^30 A.M./~~P.M.~~
August 21, 1974.

Dated: New York, New York
August 19 1974
at 10:30 A.M./P.M.

/s/ R.O.
U.S.D.J.

----------X

LUIS FUENTES,

73 Civ. 5455

Plaintiff,

-against-

ORDER

ADOLPH POMER, CAROLYN KOZLOWSKI, SAUL HILDNORN, RICHARD LEE PRICE, DONALD S. BROWN, JEROME GOODMAN, GEORGINA HOGGARD, HENRY RAMOS, LYLE BROWN, MARTIN RUBIN, CARMEN BARRETO and JANICE WONG, members of Community School Board Number One,

Defendants.

----------X

WHEREAS, plaintiff has moved for a Preliminary Injunction to enjoin "defendants, their agents, employees and representatives from proceeding with and compelling plaintiff to submit to an administrative proceeding ordered by defendants pursuant to their resolution dated August 8, 1974," and

WHEREAS, defendants have moved for a dismissal of the complaint for failure to state a claim upon which relief can be granted or in the alternative to stay all proceedings pending a decision by the Community School Board of District 1 on the charges preferred against the plaintiff, and

WHEREAS, this Court deems it necessary to hold an evidentiary hearing on the questions of bias on the part of defendants and the futility of the administrative process, and

WHEREAS, the Court deems it necessary and desirable for the state administrative hearing to proceed expeditiously in the meanwhile, and

~~WHEREAS, it is impossible for plaintiff to obtain administrative hearing~~

WHEREAS, the Court signed an Order in this matter on October 11, 1974, now

Upon the affidavits, memoranda, and all prior papers and proceedings had herein, and for good cause shown, and upon reconsideration, it is

Court's October 11, 1974 Order is hereby vacated, and it is further

ORDERED, that the evidentiary hearing before this Court previously scheduled for October 21, 1974 be rescheduled for October 25, 1974 at 10 A.M./~~P.M.~~, and it is further

ORDERED, that the administrative hearing before the Hon. Marcy Cowan, Esq. shall continue on a date ~~during the week of October 21, 1974, the date~~ to be designated by the Hearing Examiner, and ~~the hearing shall proceed immediately until completed and all parties shall participate therein.~~

IT IS FURTHER ORDERED, that service of this Order upon plaintiff's counsel on or before October 22, 1974, by 10 A.M./~~P.M.~~, shall be deemed sufficient service.

Dated: New York, N.Y.
October 21, 1974

/s/ CHARLES E. STEWART
U.S.D.J.

Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 12th day of August, 1974.

PRESENT:

HON. BERNARD NADEL Justice.

41673/74

ADOLPH ROHER, as Chairman of Community School Board, District #1,

Plaintiff,

-against-

LUIS FUENTES,

Defendant.

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINING ORDER

Upon the annexed affidavit of ADOLPH ROHER, sworn to the 9th day of August, 1974, and upon the summons and complaint herein, let the defendant show cause before this Court, at a Special Term, Part I thereof, to be held in and for the County of New York, at the Courthouse, Foley Square, in the Borough of Manhattan, City of New York on the 16th day of August, 1974, at 9:30 in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made, pending the determination of this action enjoining and restraining the defendant, from:

BN 8/13/74 1:15 P.M.

(a) preventing, hindering, or intefering in any way with the administration of the schools, staff or operations of Community School District #1.

orderly performance of educational and administrative functions of and the orderly movement of persons to, from or within Community School District #1.

(c) entering upon the premises of any building or facility under the direction and control of Community School District #1 or remaining thereon except with the permission of the Community School Board or a duly authorized agent thereof.

(d) creating any disturbance or making any loud noise upon or near the premises of any building or facility under the direction and control of Community School District #1 or to disrupt or interfere with the orderly processes of education or administration, or the orderly movement of persons therein.

(e) intimidating, threatening or coercing, or attempting to intimidate, threaten or coerce any person entering or attempting to enter any building or facility under the direction and control of Community District #1.

Meanwhile, and pending the hearing and determination of this motion, the defendant in any manner or by any means is hereby enjoined and restrained from:

(a) preventing, hindering, or interfering in any way with the administration of the schools, staff or operations of Community School District #1.

(b) disrupting, impeding or hindering the orderly performance of educational and administrative functions of and the orderly movement of persons to, from or within Community School District #1.

(c) entering upon the premises of any building or facility under the direction and control of Community School District #1 or remaining thereon except with the permission of the Community School Board or a duly authorized agent thereof.

(d) creating any disturbance or making any loud noise upon or near the premises of any building or facility under the direction and control of Community School District #1 or to disrupt or interfere with the orderly processes of education or administration, or the orderly movement of persons therein.

(e) intimidating, threatening or coercing, or attempting to intimidate, threaten or coerce any person entering or attempting to enter any building or facility under the direction and control of Community District #1.

Sufficient reason appearing therefor, LET service of a copy of this order to show cause and the papers upon which it is granted upon the defendant before 1:00 pm on the 15th day of August, 1974, be deemed good and sufficient service; ~~further and sufficient reason appearing therefor, if receipt of this order is refused by defendant, LET service of a copy of this order and the papers upon which it is granted by affixing same to the entrance door of the office of the Community Superintendent of District #1 located at 75 Avenue B, New York, N.Y.~~

E N T E R

BN

Justice of the Supreme Court

Upon the affidavit of Jeffrey S. Kay, affirmed August 13, 1974, the aforementioned Order is amended as indicated above.

8/13/74
1:15 P.M.

BN

J.S.C.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, Borough of Manhattan, City of New York on the 21st day of October, 1974.

PRESENT: HON. SAMUEL P. ROSENBERG, JUSTICE.

----------X

ADOLPH ROHER, as Chairman of Community School Board, District #1,

Plaintiff

-against-

LUIS FUENTES,

Defendant

----------X

ORDER

Index No. 41673/74

Plaintiff, having moved this Court for an order preliminarily enjoining defendant during the pendency of this action, and said motion having duly been brought on to be heard before this Court,

NOW, upon reading and filing the Order to Show Cause dated August 12, 1974, the Notice of Motion dated August 21, 1974, the Affidavits of Adolph Roher dated August 9, 1974 and August 21, 1974 and the exhibits annexed thereto, the Complaint, verified August 9, 1974, and the Reply Affidavit of Jeffrey S. Karp, Esq. dated September 5, 1974 all submitted in support of the motion, and the Affidavit of Luis Fuentes dated September 3, 1974, and the exhibits annexed thereto, the Affidavit of Richard J. Heller, Esq. dated September 3, 1974 ~~and the Reply Affidavit of Herbert Teitelbaum, Esq. dated September 6, 1974, submitted in opposition thereto~~, and due

BOARD OF EDUCATION OF THE CITY OF NEW YORK

In the Matter of the Appeal of HENRY RAMOS, et al, vs. the Chancellor, in Regard to the Special Meeting of August 8, 1974. (Case P-30)

deliberation having been had thereon, and upon filing the opinion of the Court dated October 11, 1974,

NOW, on the motion of ADRIAN P. BURKE, Esq., attorney for the plaintiff, it is

THE MOTION IS GRANTED AND THAT

ORDERED that pending the determination of this action defendant is enjoined and restrained from:

(a) preventing, hindering, or interfering in any way with the administration of the schools, staff or operations of Community School District #1.

(b) disrupting, impeding or hindering the orderly performance of educational and administrative function of and the orderly movement of persons to, from or within Community School District #1.

(c) entering upon the premises of any building or facility under the direction and control of Community School District #1 or remaining thereon except with the permission of the Community School Board or a duly authorize agent thereof.

(d) creating any disturbance or making any loud noise upon or near the premises of any building or facility under the direction and control of Community School District #1 or to disrupt or interfere with the orderly processes of education or administration,

Sworn to before me, this

of the Chancellor that, "A resolution for preferral of charges need not in its

or the orderly movement of persons therein.

(e) intimidating, threatening or coercing, or attempting to intimidate, threaten or coerce any person entering or attempting to enter any building or facility under the direction and control of Community District #1, AND IT IS FURTHER

ORDERED THAT THE DEFENDANT LUIS FUENTES SHALL BE PERMITTED TO ENTER HIS OFFICE ON PLAINTIFF'S PREMISES IN THE PRESENCE OF HIS COUNSEL AND PLAINTIFF'S COUNSEL FOR THE PURPOSE OF RECEIVING HIS PERSONAL MAIL AND OBTAINING HIS RECORDS TO THE EXTENT THAT THEY ARE NEEDED IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS AND IT IS FURTHER

ORDERED THAT THE PLAINTIFF AS A CONDITION OF THIS ORDER SHALL BE LIABLE FOR ANY DAMAGES SUSTAINED BY REASON HEREOF NOT EXCEEDING THE SUM OF $2500. DOLLARS

J.S.C.

J.S.C.

ENTER

J.S.C.

FILED
OCT 22 1974
NEW YORK
CO. CLERK'S OFFICE

Sworn to before me, this

This is an application by the Chairman of Community School Board, District #1 for a preliminary injunction restrainin defendant from entering upon the premises under the control of th School Board and interfering with the operations thereof. Defend is the district superintendent and is under suspension with pay, pending a hearing on charges made against him by a majority of the Community School Board. A temporary stay is in effect grantir most of the preliminary relief sought pending the determination o this motion.

Defendant in opposition to this motion, attacks the legality of the suspension, under the Education Law and the contr of employment between defendant and the Community School Board o which plaintiff is Chairman.

SUPREME COURT: NEW YORK COUNTY

SPECIAL TERM: PART I

----------x

ALCLUT KOHEF, as Chairman of Community School Board, District #1,

Plaintiff,

- against -

INDEX NO. 41672/71

LUIS FUENTES,

Defendant.

----------x

ROSENBERG, SAMUEL R., J.:

[illegible] in the United States District Court for the Southern District of New York for an injunction restraining plaintiff herein and the other members of Community School Board #1 from suspending him from his position as superintendent [Hunter v. Maher, et al., 73 Civ. 5755] Judge Stewart denied an application by defendant herein (plaintiff in that action) for a preliminary injunction, stating that the suspension of defendant pending a due process hearing on the charges against him did not violate his constitutional or contractual rights as he was receiving his pay and it was upon the ultimate outcome of the hearing that any violation of his rights would or would not be affected.

This court is not bound to follow the reasoning of the federal court; however, this court finds that reasoning highly persuasive and concludes that the equities will best be balanced by the granting of the preliminary injunctions sought herein and the maintaining of the status quo pending the determination of this action.

The motion is granted. Defendant is restrained from performing any of the acts against which relief is sought. However, as placed upon the record at the argument of this motion, defendant shall be permitted to enter his office on plaintiff's premises, in the presence of his counsel and plaintiffs counselfor the purpose of receiving his personal mail and obtaining his records to the

Dated: [illegible]

[illegible] VIVO [illegible]

[illegible] administrative and judicial pro-

ceedings.

Settle order.

Dated: October 11, 1978.

J. S. C.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 23, 1974.

Present—Hon. Owen McGivern, Presiding Justice
Arthur Markewich
Theodore R. Kupferman
Louis J. Capozzoli
Myles J. Lane, Justices.

Adolph Roher, as Chairman of Community School Board, District #1, Plaintiff-Respondent, -against- Luis Fuentes, Defendant-Appellant.	Affirmance of Order 1602 N

An appeal having been taken to this Court by the defendant-appellant

from an order of the Supreme Court, New York County,

~~entered on~~ (Samuel R. Rosenberg, J.), entered on October 22,1974, granting plaintiff's motion for a preliminary injunction,

and said appeal having been argued by Mr. Kenneth Kimerling

of counsel for the appellant , and by Mr. Jeffrey Karp

of counsel for the respondent ; and due deliberation having been had thereon,

It is hereby unanimously ordered that the

order so appealed from be and the same is hereby affirmed, and that the respondent recover of the appellant $40 costs and disbursements of this appeal.

ENTER: HYMAN W. GAMS

Clerk.

NYLJ-12-24-74

P. 2. col. 3

Opp. Acc. - 1st Dept.

Kaye

1602N. ROHER, plf-res, v. FUENTES, def-ap — Order, Supreme Court, New York County (Samuel R. Rosenberg, J.), entered on Oct. 22, 1974, unanimously affirmed, and that the respondent recover of the appellant $40 costs and disbursements of this appeal. No opinion. Order filed.

Aug 19, 1974

BOARD OF EDUCATION
OF THE CITY OF NEW YORK
110 LIVINGSTON STREET
BROOKLYN, N.Y. 11201

IRVING ANKER
CHANCELLOR

Members, Community School Board 1

Ladies and Gentlemen:

On August 8, 1974, Dr. Bernard Gifford, as Acting Chancellor, issued a decision in response to a grievance submitted by several members of Community School Board 1 and other grievants relating to the adequacy of the notice of a special meeting with respect to the action to be taken at that meeting. In his decision, Dr. Gifford stated that the notice of the meeting was adequate for the Community School Board to act on the preferral of charges against the Community Superintendent provided that the charges were made public prior to the Community School Board taking any action on the preferral of charges.

Subsequent to Dr. Gifford's decision, petitioners have submitted an amendment to their grievance alleging that the resolution adopted by the Community School Board preferring specific charges against the Community Superintendent and suspending him immediately, was in clear violation of the Acting Chancellor's decision since the Community School Board did not make available to all the Community School Board members and the public the specific charges prior to the Community School Board taking action on the preferral of charges. Petitioners request, among other things that I declare the resolution null and void.

Petitioners concede that copies of the resolution were available to the Community School Board members and the public at the August 8 meeting at which the resolution was passed. That resolution contained a statement of the nature of the charges against the Community Superintendent. A resolution for preferral of charges need not include specifications of the charges to satisfy the requirements of notice and the Acting Chancellor's decision of August 8, 1974. A listing or statement of the charges provides adequate notice. To consider an analogous situation, it should be noted that the stating of charges without the specifications of those charges is the standard practice as used in the preferral of charges against tenured personnel under the jurisdiction of the Central Board.

Since the resolution was available at the meeting and contained a statement of the nature of the charges, I cannot find that the resolution failed to comply with applicable law or the prior decision of the Acting Chancellor.

It is a fundamental principle in grievances that no individual or group of individuals seeking relief may raise the rights of another. This decision, therefore, is not to be construed as interpreting the Community Superintendent's

rights under law or under his contract of employment. Such matters are presently the subject of litigation. To the extent that the Community Superintendent's rights under law or under his contract with the Community School Board are involved, the court would appear to be an appropriate forum.

The grievance is hereby dismissed.

It is so ordered.

IRVING ANKER
Chancellor

IA:ar

cc: Arnold Rothbaum, Esq.
Attorney for Petitioners
Mr. Alfredo Mathew, Jr.
Michael B. Rosen, Esq.

BOARD OF EDUCATION OF THE CITY OF NEW YORK

In the Matter of the Appeal of HENRY RAMOS, et al, vs. the Chancellor, in Regard to the Special Meeting of August 8, 1974. (Case P-90)

This is an appeal pursuant to "Rules and Regulations Governing Grievances against Community School Board Members" adopted by the Board of Education November 17, 1971, brought by Henry Ramos and three other members of the Community School Board, the President of the Parents Council and other individuals in Community School District One. The appeal is from a decision of the Chancellor dated August 19, 1974 upholding the validity of the procedure followed by Community School Board 1 (hereinafter referred to as C.S.B.) at its Special Meeting of August 8, 1974.

Appellants through counsel argue that the presentation of charges against the Community Superintendent at the Special Meeting did not constitute adequate prior notice in compliance with the decision of the Acting Chancellor dated August 8, 1974 and in accordance with applicable State law and policy. The Acting Chancellor stated that specific charges aginst Mr. Fuentes, the Community Superintendent, must be provided "prior to the Community School Board taking any action on the preferral of charges...." The Board of Education holds that the presentation of these charges at the opening of the Special Meeting on August 8, 1974 fully meets this determination and constitutes due notice under applicable law. Furthermore this action complies with Section 6, Article III of C.S.B. Bylaws governing special meetings:

> "The notice shall state the special matter or matters to be presented to the Board at a special meeting." (emphasis added)

In other words the matter to be acted on at a Special Meeting can be presented at the meeting under C.S.B. Bylaws in contrast to the agenda of resolutions required to be included in the notice of a regular meeting. (Section 3, Article III of C.S.B. Bylaws)

The Mailgram of August 6, 1974 announcing the Special Meeting stated: "The purpose is to consider and act on charges of misconduct filed against Luis Fuentes, Community Superintendent...." Since the suspension of Mr. Fuentes was not specifically mentioned in the notice, appellants argue that the matter dealt with and the action taken at the meeting was so different as to violate the section of the By-laws referred to above which states: "Only such specific matters as are stated in the notice shall be considered at such [special] meeting unless the members present unanimously decide otherwise."

What action other than suspension C.S.B. had in mind when it stated that it was planning to act on charges of misconduct would be difficult to guess. Suspension is the proper and required step to be taken while investigating or otherwise acting on serious charges of misconduct. This meaning is clear to members of the Board of Education and apparently to C.S.B. which set the matter down for a prompt hearing before a Trial Examiner. Such action did not require 'unanimous consent' before proceeding.

Counsel for appellants contends that the Chancellor's ruling of August 19, 1974 to the effect that the resolution containing "a statement of the nature of the charges" presented for action at the Special Meeting (August 8, 1974) does not meet the requirement set forth in the Acting Chancellor's decision of August 8, that, "Prior to the Community School Board taking any action on the preferral of charges... the Community School Board must make available to all the Community School Board members and the public the specific charges against Mr. Fuentes."

The statement of the charges contained in the C.S.B. resolution is sufficiently specific to apprise C.S.B. members of the matter being acted upon and to protect the rights of Mr. Fuentes. The Board of Education accepts as correct the finding

of the Chancellor that, "A resolution for preferral of charges need not include specifications of the charges to satisfy the requirements of notice and the Acting Chancellor's decision of August 8, 1974." Furthermore counsel for appellant admits that the specifications of the charges were annexed to the resolution acted on at the meeting arguing only that they were not made available to the general public nor to Mr. Fuentes prior to the action by C.S.B. Such specifications are not required to be presented except in connection with the actual trial when they are made available to permit preparation of a defense.

The action of the Chancellor is in accord with Board policy and practice and is neither arbitrary, unreasonable, nor capricious, nor contrary to law regulations or sound educational policy. The appeal is denied and the orders of the Chancellor are hereby affirmed.

By Order of the Board of Education

Harold Siegel
Secretary

September 4, 1974

No 8995

The University of the State of New York

The State Education Department

Before the Commissioner

IN THE MATTER

of the

Appeal of HENRY RAMOS, JANICE WONG, GEORGINA HOGGARD, CARMEN BARRETO, MIRIAM GONZALEZ and CARMEN DEANE from action of the Board of Education of the City School District of the City of New York, regarding a special board meeting.

Arnold Rothbaum, Esq.....attorney for petitioners

Hon. W. Bernard Richland, Corporation Counsel.....
.....attorney for respondent
Jeffrey S. Karp, Esq., of counsel

The petitioners, four of whom are members of the community board of education of Community School District No. 1 in New York City, appeal from a decision of the New York City board of education which affirmed a decision of the Chancellor with respect to the action of the community board in suspending the community superintendent.

On August 6, 1974 board members received mailgrams from the community board chairman, advising them of a special board meeting scheduled for August 8. Among the stated purposes of the meeting was

the consideration of, and action on, charges of misconduct which had been preferred against community superintendent Fuentes. On August 7, petitioners appealed to the Chancellor pursuant to Education Law section 2590-l, requesting him to enjoin the community school board from holding the special meeting and from acting upon the items listed in the mailgram and to order the board to abide by existing by-laws and statutes regarding proper notice of public meetings. Shortly before the meeting was to begin on August 8, an order of Acting Chancellor Gifford was handed to each board member. The Acting Chancellor found the notice given to have been adequate for considering the preferral of charges against the community superintendent, but that prior to any action by the board, the specific charges would have to be made available to all board members and to the general public.

Soon after the special meeting commenced, a new agenda was distributed to members of the board which contained specific charges, i.e., disruption and hostility in the district and community animosity towards the board, which were attributed to the community superintendent. The resolution provided for the suspension of the superintendent and hearing on August 28, 1974 before a trial examiner designated by the [illegible] resolution was adopted by the board by a five to zero vote, [illegible] petitioner board members abstaining. Pending a disposition of charges, the deputy superintendent was placed in charge of the district office.

On August 9, 1974, petitioners appealed to the Chancellor, seeking enforcement of the Acting Chancellor's order of August 8. The Chancellor dismissed the appeal on August 19 and the following day, petitioners appealed to the city board from the Chancellor's decision. A hearing was held on August 30 and the city board dismissed the appeal. The city board found that there had been sufficient notice regarding presentation of charges against the community superintendent and that the statement of charges contained in the resolution adopted by the community board was sufficiently specific to apprise the board members of the matter to be acted upon and protect the community superintendent's rights. Petitioners' present appeal seeks an order declaring the resolution adopted by the community board at its August 8 meeting null and void and seeks the reinstatement of Louis Fuentes as community superintendent.

Respondent contends that the issues raised in this appeal are the same as those presently pending in current litigation in the courts, and requests that the Commissioner decline jurisdiction of this appeal. It is well settled that Commissioners of Education will decline to entertain jurisdiction of an appeal where it appears that the issue in controversy is already the subject of pending litigation in another forum (Matter of Cook, 4 Ed. Dept. Rep. 172; Matter of Intosh, 12 id. 3; Matter of Fraccola, 12 id. 288; Matter of Harris, 13 id. 24). The petition in this appeal relates to alleged procedural defects in the community board's August 8 special meeting, and to alleged illegality of the community superintendent's suspension

by the community board in view of the provisions of section 2590-j of the Education Law. The proceeding pending in Supreme Court, New York County, contrary to respondent's contention, does not concern these issues but deals with disruption in the district caused by the discontinuance of two principals at P.S. 188. Other court proceedings involve Mr. Fuentes directly, but do not involve the present petitioners. Since respondent has failed to show that the present issues are being litigated by these parties in another forum, there is no basis for me to decline jurisdiction of this appeal.

Petitioners contend that the community board does not have the authority to suspend the community superintendent but that this power rests with the Chancellor pursuant to Education Law section 2590-j. Petitioners' reliance on paragraph (e) of subdivision 7 of section 2590-j is misplaced, because that paragraph relates to the suspension of an employee by the Chancellor upon the recommendation of the community superintendent, rather than to the suspension of the community superintendent. Paragraph a of subdivision 1 of section 2590-e of the Education Law empowers the community board to "employ a community superintendent by contract for a term not to exceed by more than one year the term of office of the community school board authorizing such contract, subject to removal for cause." Clearly the community board has statutory authority to suspend the community superintendent, following preferral of charges and subject to a hearing on his dismissal.

Petitioners also contend that respondent city board was arbitrary and capricious in affirming the Chancellor's decision. On reviewing the record and the city board's determination, I find this contention to be without merit. Consistent with Article III, section 6 of the community board's by-laws, mailgrams were sent to board members which stated that the purpose of the August 8 special board meeting was the consideration of and action on the charges of misconduct preferred against Mr. Fuentes. I do not find it unreasonable or arbitrary to hold that this notice encompasses board action suspending the community superintendent. Further, the community board made copies of the resolution containing the charges against Mr. Fuentes available at the opening of the special meeting and prior to the board taking action on the charges, thereby complying with the Acting Chancellor's August 8 order.

Since the challenged decision is neither arbitrary nor capricious nor contrary to law, the appeal must be dismissed (Matter of Community School Board No. 18, 12 Ed. Dept. Rep. 121; Matter of Harris, supra; Matter of Susskind, 14 id. __, decision no. 8881, dated September 19, 1974).

THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 18th day of April, 1975.

Commissioner of Education

COMMUNITY SCHOOL BOARD OF SCHOOL DISTRICT ONE
75 AVENUE B, NEW YORK, NEW YORK 10009

SPECIAL PUBLIC MEETING
August 8, 1974

TIME: 4:00 P. M.
PLACE: P. S. 19 -
185 First Avenue

AGENDA

RESOLUTIONS

1. The period during which Luis Fuentes has occupied the office of Community Superintendent of District 1 has been marked by increasing violence, dissension, harassment of educational personnel, maladministration of community school affairs, polarization of races, factionalism, and hostile displays culminating in illegal boycotts, interruptions of Community School Board meetings and interference with the proper functioning of the duly elected Community School Board in the discharge of its responsibility to conduct the business of education of the children of the district.

Serious charges against Mr. Fuentes have been presented and are now before the Board for decision. In his dealings with members of the Community School Board, Mr. Fuentes has exhibited antagonism, disrespect and truculence. He has openly flaunted his hostility toward and disregard of the lawful directions of, the duly elected Board, thereby contributing to the disruption of the educational processes in the District. He has publically called for opposition to the lawful decisions, actions and directions of the School Board and has served as a rallying point and focus for the small minority which has interfered with the Board in the exercise of its duties and its authority.

For the foregoing reasons, the Board suspends Mr. Fuentes from the position of Community Superintendent of District 1 pending the hearing and determination of the charges. The annexed charges are directed to be served on Mr. Fuentes.

A hearing before a person to be designated as trial examiner by the Board, with full notice and opportunity to Mr. Fuentes to attend with counsel and participate, will be held on August 28, 1974 and on any adjourned dates at the Board of Education, 65 Court Street, Brooklyn, N. Y., at a time to be announced by the trial examiner to be selected. The report and recommendations of the trial examiner will be received and acted upon by the Board. Pending the disposition of these charges, Mrs. Annie Mersereau, Deputy Superintendent, will be in charge of the District office.

Mr. Fuentes is ordered and directed to remain away from the District offices and from the school buildings under the jurisdiction of the Board pending the determination of these charges. His actions and demeanor during these proceedings will be taken into account by the Board in arriving at its determination.

The Board retains Richard L. Aronstein as its counsel to present evidence on the charges to the hearing officer and act on its behalf in these proceedings.

EXPLANATION: The Board must take appropriate action on charges which have been filed against the Community Superintendent because of their serious nature.

EXHIBIT E

2. The Board appoints Martin Senff as Executive Assistant to the Board.

EXPLANATION: The Board fills a vacancy in the School Board office.

3. The Board retains Richard L. Aronstein as its counsel to represent the Board in connection with the Grievance dated July 10, 1974 filed with the Chancellor, and at any hearings and appeals.

EXPLANATION: The Board is required to retain its own legal counsel to represent it before the Chancellor and at any hearings on the Grievance.

PUERTO RICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
315 SECOND AVENUE
NEW YORK, NEW YORK 10017
212-697-6965

CHARGES AND SPECIFICATIONS AGAINST
LUIS FUENTES, COMMUNITY SUPERINTENDENT,
COMMUNITY SCHOOL DISTRICT 1, RESPONDENT

CHARGE I - IMPROPER COMMITMENT AND EXPENDITURE OF PUBLIC FUNDS.

Specifications:

1. In May 1974, Respondent illegally and improperly permitted the withdrawal of its bid by the successful bidder for the school lunch program contract and recommended the award of the contract to the next higher bidder in violation of the terms of the invitation to bid and of law, thereby increasing the cost to the District of the program by $24,000. and, upon information and belief, that the actions of Respondent as aforesaid were with the purpose and intent of procuring the award of said contract to Service Dynamics Corp. although said company was not the lowest bidder.

2. In October 1973, Respondent improperly caused and permitted the installation of partitions and the performance of other work in and about the School District Offices at a cost in excess of $7,000., with notice and knowledge of the imminent removal of the offices to another location and the necessity of restoration of those premises after such removal.

3. In or about September 1973, Respondent permitted improper expenditure of public funds of the District in the preparation and distribution of partisan and improper printed material relating to the District budget without the authority of the Board and prominently displayed such material in the District office.

4. Contrary to the express directions of the Board, Respondent signed a contract on behalf of the District to retain a consultant to evaluate Funded Programs, and while the matter was under review by the Board.

CHARGE II - DECEIT, INSUBORDINATION AND CONDUCT PREJUDICIAL TO THE GOOD ORDER OF THE DISTRICT.

Specifications:

1. In June 1974, at an executive meeting of the Board, Respondent was insolent and insubordinate to the Chairman of the Board then presiding, in stating to the Chairman in the presence of members of the Board, words to the effect that Respondent was through taking verbal directions on School District matters from the Chairman and that he would not respond to any such directions unless same were put in writing to him, and that Respondent was through dealing with the Chairman as a human being.

2. At said executive meeting of the Board held in June, 1974, Respondent left the meeting before its conclusion, contrary to express directions of the Board that he remain in his official capacity of Community Superintendent and in violation of the By-Laws of the Board and his employment contract.

3. At a public meeting of the Board held in June 1974, Respondent, in violation of the ruling of the Chairman that a question addressed to the Respondent relating to racial composition of a group of employees of the District was out of order, persisted in answering said question and stated to the Chairman words to the effect that this was not the first time the Respondent had been out of order and that it would not be the last time.

4. In June 1974, Respondent ordered the Deputy Superintendent not to attend executive meetings of the Board, knowing that said Deputy Superintendent had been expressly invited and directed to appear at said meeting. As a result thereof, the Deputy Superintendent failed to attend at said meetings, thereby impeding the Board in the performance of its duties.

5. In May 1974, identifying himself as Community Superintendent, Respondent engaged publicly in partisan political activity on behalf of certain candidates for election to the School Board and in opposition to other candidates, certain of whom were thereafter elected to the Board, thereby reducing and impairing his ability to function as an employee of said Board and its duly elected members.

6. On September 25, 1973, Respondent falsely stated and reported to the Board that he had conducted a complete investigation of alleged improprieties occurring on school property involving hiring of personnel for a proposed bilingual program, in accordance with his prior statement on his intention to interview certain witnesses to the incident. That said report was false in that Respondent did not conduct a complete investigation and did not interview said witnesses.

7. On October 2, 1973, Respondent stated to the Board that he was not aware of any financial difficulties in the District's affairs and that he knew of nothing to justify talk in the District of the need to release between 50 and 100 teachers although prior thereto (a) Respondent had caused his deputy superintendent to announce to District personnel that in excess of 50 teachers would have to be let go, (b) prior thereto Respondent had issued an order not to hire substitute teachers and (c) prior thereto, Respondent had informed principals in the District that the District budget had been drastically cut.

8. In August 1973, Respondent threatened violence and danger to the persons of members of the Board in the future in the event that they did not make "wise" decisions as such members of the Board.

9. In September 1973, at a public meeting of the Board, while in attendance in his capacity as Community Superintendent, Respondent publicly stated that the Chairman of the Board, who was then presiding at a meeting as such, was a liar.

CHARGE III - BREACH OF EMPLOYMENT CONTRACT DATED OCTOBER 31, 1972.

Specifications:

1. In May 1974, Respondent caused the hiring of two additional employees of the District without informing the Board of the existing vacancies, in violation of the provisions of paragraph 3.b of his employment contract.

2. In July, August, September and October, 1973, Respondent made in excess of 60 appointments to teaching positions in the District without informing the Board of the existing vacancies, in violation of the provisions of paragraph 3.b of his employment contract.

3. In October 1973, Respondent failed and/or neglected to notify the Board of his communications in writing to the chancellor, in violation of the provisions of paragraph 3.e. of his employment contract.

CHARGE IV. - INSUBORDINATION, NEGLECT OF DUTY AND INEFFICIENCY.

Specifications:

1. In June and July 1974, Respondent failed and/or refused to implement resolutions and actions duly adopted by the Board at its meetings.

2. In May, June and July 1974, Respondent impeded and impaired the proper functioning of the Board for a period of over two months by failing to cause necessary budgetary funds to be provided to the Board for its proper functioning after and despite repeated requests and orders therefor by the Board.

3. Respondent failed and neglected to investigate incidents of assaults on children and on a parent at P. S. 110 and render a report after being directed to do so in June 1974.

4. In October 1973, Respondent caused and/or permitted changes in resolutions on the agenda for the proposed public meeting of October 9, 1973, after its adoption at the Executive meeting of the Board, in violation of the By-Laws.

5. In October 1973, Respondent caused and/or permitted delay in reproduction and distribution of the agenda of the proposed public meeting of October 9, 1973 in time to permit due notice of the meeting to the community, thereby preventing the meeting from being held as scheduled.

6. In October 1973, in defiance of the directions of the Board, Respondent improperly expended District funds in preparing and reproducing written material to institute the Chinese bilingual program in J.H.S. 22 without the prior approval of the Board.

7. When ordered in September 1973 to conduct an investigation of charges of anti-Semitism at J.H.S. 22, Respondent failed to do so, and in lieu of an investigation, reported his opinions and feelings to the Board.

8. In October 1973, contrary to the express direction of the Board to conduct the aforesaid investigation personally and to report the results thereof to the Board, Respondent engaged one Algernon Black to conduct such an investigation. That in defiance of the express orders of the Board to the contrary, Respondent failed to personally conduct such investigation and caused and/or permitted Mr. Black to conduct such investigation on school premises on October 10, 1973.

9. Since July 1973, Respondent has refused and neglected to release an employee of the District, contrary to and in defiance of the expressed, repeated directions of the Board.

10. Respondent has refused to sign the District Budget Schedule (tax levy) 1973/1974 in defiance of the express orders of the Board.

11. In or about August 1973, Respondent submitted his version of a District Budget Schedule to the Central Board of Education in defiance of the express order and direction of the Community Board, and requested that said Budget Schedule be accepted and the Schedule prepared by the Board not be accepted.

12. In or about September 1973, Respondent replied to a communication concerning the status of a principal in the District and misstated and misrepresented the position of the Board.

13. Since July 1973, Respondent has failed and neglected to provide the Board with resumes of all personnel employed in the District office after repeated requests and demands, and

14. Since July 1973, Respondent has failed and neglected to take any action to restrain clearly identified employees of the District from yelling, booing and harrassing members of the Board at public meetings of the Board, and has taken no steps to discipline any such employees or to instruct or warn them to refrain from interfering with the Board in the performance of its official duties. That Respondent, in September 1973, interfered with the restoration of order at a public meeting of the Board.

CHARGES AGAINST LUIS FUENTES, COMMUNITY SCHOOL BOARD NO. 1

CHARGE V - INSUBORDINATION.

Specifications:

1. In July and August of 1973, you did refuse to obey and implement an order of the Community School Board to discharge AZALIA TORRES and ANNA MARIA CARRATTINI.

2. In August of 1973, you did publicly state that you do not recognize the authority of the Community School Board and that you will not recognize or carry out its orders and directives.

3. In violation of an order of the Community School Board you did order and direct ALAN BOONE to conduct a hearing on October 10, 1973.

CHARGE VI - MISCONDUCT.

Specifications:

1. In March and April of 1973, you did order, direct and participate in the solicitation of campaign funds in violation of law.

2. That in March and April of 1973, you did authorize, cause and permit the use of public funds, materials and facilities for the printing and publication of partisan political material.

3. That in July and August of 1973, you did conspire with and aid certain individuals in their effort to impede, disrupt and interfere with the conduct of Public School Board meetings.

4. That in May and June of 1973, you did violate "Circular 30" in the selection and appointment of principals in District 1.

5. That in 1972 and 1973, you did unduly and improperly interfere in the affairs of Parents Associations and the conduct of elections by Parents Associations.

CHARGE VII. - CONDUCT UNBECOMING A DISTRICT SUPERINTENDENT AND PUBLIC OFFICIAL:

Specifications:

1. On April 29, 1973 and April 30, 1973, you did engage in partisan electioneering by the use of a sound truck.

2. That on May 2, 1973, you did participate in picketing in front of J.H.S. 71 together with students and others during the hours of your employment.

3. That you engaged in partisan political conduct during the campaign for the election of Community School Board members in District 1 on May 1, 1973.

EMPLOYMENT AGREEMENT dated October 31, 1972 between Luis Fuentes of 151 Norfolk Street, New York, New York (hereinafter called Employee) and Community School Board, District One, of New York City (hereinafter called School Board) in consideration of the mutual convenants herein contained do hereby agree as follows:

1. The School Board hereby employs Employee, and Employee agrees to serve the School Board, in the position of Community Superintendent, for a period (the Employment Period) commencing August 1, 1972 and ending, unless extended, on July 31, 1975, subject to the right of the School Board to terminate this Agreement as hereinafter provided.

2. During the Employment Period, Employee will devote his entire time, energy and skill during regular business hours to the services of the School Board, and shall not engage in any other employment except as expressly permitted by the School Board.

3. The position of Community Superintendent shall include the following responsibilities:

a. the duties specified in Sections 2590-(f), 2590-(j) (7) and (8) of the New York Educational Law, and such other duties as the School Board shall hereafter assign, subject in all the foregoing instances to the policies, procedures and specific instructions of the School Board; or any of its duly authorized subcommittees;

b. the duty to inform the School Board promptly of (i) all vacancies within the District, (ii) the appropriate eligibility requirements mandated by state law or the policies of the Board of Education of

th City of New York, if any, for such positions, (iii) his evaluation of all personnel eligible for tenure with the District by not later than 60 days in advance of the date on which their continued employment would constitute a basis for tenure under either state law or the By-laws and procedures of the Board of Education of the City of New York;

c the preparation of tentative expense budgets within 30 days prior to the first public expense budget hearing required of the School Board by Section 2590-(i)-(2), as amended, of the New York Education Law;

d. supervision of all personnel, instructional, supervisory and other, within the District; and

e. attendance at all meetings of the Community School Board, and notification of the School Board, without further request, of all communications and dealings with the Chancellor and the Board of Education of the City of New York, and all significant decisions made by the Chancellor, the Board of Education of the City of New York affecting the authority of the School Board to manage and direct the affairs of the school within the District.

4. As renumeration for his services, Employee shall receive per annum such salary and other benefits as shall be prescribed for the position of Community Superintendent by the Board of Education of the City of New York and shall be entitled to no other renumeration or benefits from School Board, except as hereinafter specified. Any accumulated sick or annual leave time accrued through previous appointments and with the Board of Education shall follow Employee and School Board agrees to recognize them.

5. The parties hereto recognize and agree that the position of Community Superintendent is a nontenured position, and that because of the sensitive and unique nature of the position, Employee shall be subject to dismissal by the School Board (acting by a two-thirds majority vote) upon six month's notice for cause by the School Board, or if Employee is unable to serve for any reason, including death or permanent incapacity. Cause shall consist only of those matters enumerated in subdivision 7 (b) of Section 2590-(j) of the Education Law. School Board, except as they shall be inconsistent herewith, shall be subject to the procedural rules of subdivision 7 of Section 2590-(j) of the Education Law, provided that school board shall have such powers and duties as are therein prescribed for the Community Superintendent. School Board, agrees that this agreement shall not interfere with Employee's otherwise acquired rights of tenure.

6. This Agreement may be modified only in writing and upon ratification by a majority of the School Board: it shall be deemed severable so that if any provision is deemed invalid or ineffective under state or Federal law by a court of competent jurisdiction or by an authorized Federal agency (including the Cost of Living Council or any authorized delegate body thereto), this Agreement shall remain in full force and effect except for such invalid provision.

The foregoing Agreement is hereby executed on behalf of School Board pursuant to a resolution adopted by it at a public meeting of said Board held on July 19, 1972

Lyle Brown
Acting Chairman, Community School Board
District Number One

Luis Fuentes
Community Superintendent

State of New York
New York County
New York, New York

On this day October 31, 1972 named persons (both known to me) appeared to affix their signature to this contract.

Notary Public

Seal: Arnold Rothbaum
Notary Public, State of New York
24-3774333
Qualified in Kings County
Commission Expires
March 3, 1973

PUERTO RICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
815 SECOND AVENUE
NEW YORK, NEW YORK 10017
212-697-6065

VICTOR MARRERO
CHAIRMAN OF THE BOARD
CESAR A. PERALES
EXECUTIVE DIRECTOR

BY HAND

August 28, 1974

Marcy H. Cowan
Trial Examiner
Abrams & Cowan
Attorneys at Law
250 West 57th Street
New York, New York 10019

RE: C.S.D. #1 and Luis Fuentes

Dear Mr. Cowan:

This is to confirm my telephone conversation with your secretary on August 27, 1974 advising her that I would be unable to attend the meeting previously scheduled for today in your office, August 28th, 1974 at 3:00 p.m.

Pending litigation in both federal and state courts related to this matter have made such a meeting inadvisable at the present time.

Thank you for your attention.

Sincerely yours,

Richard J. Hiller

Richard J. Hiller
Staff Attorney

RJH:mr
cc: Joseph Aronstein

B

PUERTO RICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
815 Second Avenue
New York, New York 10017
212-687-6644

Victor Chairman of the Board

September 30, 1974

Marcy H. Cowan, Attorney-at-Law
250 West 57th Street
New York, New York 10019

In the Matter of Luis Fuente

Dear Mr. Cowan:

An Order to Show Cause was signed today by the United States District Court for the Southern District of New York respecting whether or not a preliminary injunction should be issued prohibiting the administrative proceeding in which you have been appointed as a hearing examiner from continuing. In light of that order, petitioner has been advised by counsel to take no further steps respecting the administrative proceeding until the determination of the issue before the Federal Court is had.

Accordingly, until a decision is rendered by the Court, petitioner will appear at no further meetings nor serve any papers in this matter.

Respectively yours,
HERBERT TITELBAUM
Legal Director

amp

ABRAMS & COWAN
ATTORNEYS AT LAW
280 WEST 57th STREET
NEW YORK, N. Y. 10019

ALVIN R. COWAN
KARL RICE ABRAMS

HENRY CLAUSON
MARILYN H. COWAN
CHARLES H. EMALL

CABLE ADDRESS
MAURALVIN-NEWYORK

(212) 245-2580-1-2-3-4

October 3, 1974

Puerto Rican Legal Defense
& Education Fund, Inc.
815 Second Avenue
New York, N.Y. 10017

Re: In the Matter of Luis Fuentes

Attention: Mr. Teitelbaum

Gentlemen:

Your moving papers to restrain the holding of administrative hearings startled me. The position you took was most unexpected and so different from the transcript of the conference would lead one to anticipate.

No objection was raised by you to hearings from 4:00 p.m. to 6:00 p.m. No request was made by you for longer or more frequent sessions.

My teaching at Brooklyn College is either on Tuesday or Thursday at 6:00 p.m. It will not interfere with a normal full court day session as often as the parties desire in order to expedite things, subject, of course, to request by either party for an adjournment based on acceptable legal excuse.

If you will read the transcript of the conference we had, especially pages 45 and 46, I believe that you will see that there is nothing therein to destroy the understanding that we will have the first meeting for the taking of testimony on Wednesday, October 16, 1974 at 4:00 p.m. at the New York County Lawyers Association Building at 14 Vesey Street, New York City. I expect you there then.

.....Continued

ABRAMS & COWAN

Hopefully the attorneys and I will agree on a schedule of days and hours to permit moving with despatch. If necessary, I will set forth the schedule if the attorneys can't agree, making every effort to be as helpful as possible to all involved.

Cordially yours,

MHC:mc

MARCY H. COWAN

C.C. Richard Aronstein, Esq.
275 Madison Avenue
New York, N.Y.

The State Education Department

Before the Commissioner

IN THE MATTER

of the

Appeal of MORTIMER J. ABRAMOWITZ from action of the Board of Education of the Great Neck Union Free School District, regarding his dismissal as superintendent of schools.

Meyer, English & Cianciulli, Esqs.....attorneys for petitioner
Emil V. Cianciulli & Bernard Gartlir, Esqs., of counsel

Jack Korshin, Esq.....attorney for respondent

Petitioner Mortimer J. Abramowitz was employed as superintendent of schools by the respondent board of education of the Great Neck Union Free School District in 1970 pursuant to a contract which, through successive amendments, would expire on June 30, 1977. The agreement makes specific provision for termination of the superintendent's services for cause during the term of the contract. Section 5 of the agreement provides as follows:

"Throughout the term of this contract, the Superintendent shall be subject to discharge for good and just causes based upon clear and convincing evidence of insubordination, incompetency, or neglect of duty. The Superintendent in such instances shall have the right to service of written notice of hearing and a fair and impartial hearing before the Board. If either party wishes to be represented by legal counsel at such hearing or hearings the Board and Superintendent shall have that privilege but shall be responsible for the payment of its or his legal expenses."

On or about August 26, 1974 respondent board of education adopted a resolution authorizing the retention of special counsel for the purpose of preparing written charges of insubordination, incompetence and neglect of duty against petitioner herein. Special counsel, once retained, would further be responsible for prosecution of such charges. On September 23, 1974 respondent adopted a series of resolutions charging petitioner with acts of insubordination, incompetence and neglect of duty. When a hearing was scheduled before respondent board in connection with such charges, petitioner instituted an appeal to the Commissioner of Education requesting that the hearing before the board be stayed and that the Commissioner or his designee adjudicate the charges asserted by respondent against the petitioner. When the request for such a stay order was denied the hearing preceded before respondent board.

On January 27, 1975, respondent sustained twelve of the sixteen charges against petitioner and voted to terminate petitioner's services for cause pursuant to the provisions of the agreement.

On or about January 28, 1975, petitioner filed an amended petition alleging wrongful discharge and sought an order staying respondent's determination during the pendency of his appeal. On January 28, 1975, I issued such an order, finding that "it would not be in the best interest of the school district to permit respondent to terminate petitioner's services and employ a new superintendent while this matter is pending before me".

Petitioner argues that he was denied procedural due process in connection with the hearing procedures followed by respondent. He alleges that the board was prejudiced against him and had previously sought his resignation. He further argues that the board impermissibly mixed investigative, prosecutorial and adjudicatory functions to the extent that it investigated acts of alleged misconduct, initiated charges based thereon, testified in support of such charges and thereafter weighed the evidence, making a decision based in large part upon its evaluation of the credibility of the witnesses. Petitioner contends that this mixing of functions per se

violated his right to procedural due process in conjunction with such "fair and impartial hearing" and that the mixing of functions vitiated the results of the hearing.

It is a well-settled rule of administrative law that where there is but a single body which is authorized to investigate or conduct a hearing in a given situation, the right or duty of such body to proceed cannot be defeated by disqualification of the designated officer or agency on the ground of alleged prejudgment or bias (People ex rel Hayes v. Waldo, 212 N.Y. 156; 1 N.Y. Jur., Administrative Law, §28; 2 Davis, Administrative Law Treatise, §12.04). Where the "rule of necessity" applies, such prejudice can be raised either in an action at law (People ex rel Jones v. Scherman, 66 App. Div. 231; affd. 171 N.Y. 684; Matter of Reed v. Richardson, 26 Misc 2d 89) or, as in the instant case in an appeal to the Commissioner (Matter of Mercer, 9 Ed. Dept. Rep. 75). Pursuant to the above-quoted contractual provision, only the board of education could hear charges seeking removal of its chief school officer. If it were precluded from exercising this authority solely by virtue of an alleged bias or predisposition, its employees would be insulated to a degree which might frustrate the ends of justice. Thus, respondent was not required to abdicate its responsibility under the

agreement or to appoint hearing officers where it sought to exercise its prerogatives thereunder (Matter of Gray v. Board of Education, 42 AD 2d 742).

Petitioner's contention that the performance of multiple functions by a board of education per se denies him a fair and impartial hearing is without merit. In Kinsella v. Board of Education, 378 F. Supp. 54, a three-judge district court found no due process violation where a board of education in a tenure removal proceeding brought pursuant to the provisions of the Education Law section 3020-a first determined probable cause (an accusatory function) and thereafter rendered a determination on such charges (see also Matter of Widger v. Board of Education, 35 Misc 2d 529). Similarly, it has been held that under the "rule of necessity", respondent's board members were not precluded from testifying as to the acts or omissions alleged in the charges (Matter of Moran v. School Committee of Littleton, 317 Mass. 591; 59 N. E. 2d 279). However, the weight to be given such testimony and the findings of fact based thereon will be strongly influenced by the multiplicity of functions which the board performed and by the evidence of the existence of such prejudice or bias (cf. Footnote 13 in the decision of the U. S. Supreme Court in Pickering v. Board of Education,

331 U. S. 563, at page 578).

Respondent, in sustaining twelve of the sixteen charges against petitioner, produced virtually no testimony other than that of the three members constituting the "majority" faction of the Great Neck board of education, who, in instance after instance (as reflected in numerous portions of its decision of January 27, 1975) chose to accept "the evidence of the senses of its own members" (page 67), or who, in making findings of fact, "cannot reject that which they themselves heard" (pages 23 and 38).

The sixteen charges voted by respondent fell generally into three categories: refusal to follow directions, express and implicit, to take certain actions; failure to develop or implement adequate programs in certain curricular and supportive areas; and failure to limit expenditures to amounts authorized by the board. Respondent found clear and convincing evidence of acts of incompetence, insubordination and neglect of duty in connection with twelve of these charges. I have carefully reviewed the record below, including the transcripts and exhibits thereto, and the decision of the board dated January 27, 1975, together with the findings of fact made therein, and hold that respondent has failed to sustain the burden of demonstrating

such insubordination, incompetence and neglect of duty by "clear and convincing evidence", as required by the terms of the contract. The record bears witness to the existence of serious conflicts between the majority faction of the board and the superintendent and among the various board members themselves. The record further indicates substantial confusion concerning the respective powers and duties of the board of education and the superintendent with respect to governance of the affairs of the district.

The record is replete with instances of failures of communication predicated upon insufficiently clear instructions coupled with subsequent confusion over what course of action was expected or required.

It would serve no useful purpose to summarize each of the charges which were sustained and to comment with respect to the evidence related thereto. It is sufficient for purposes of this decision to note that respondent has clearly failed to sustain the burden of proof imposed on it by the terms of the contract to which it is a party. Consequently, the resolution of the Great Neck Board of Education terminating petitioner's services must be vacated, annulled and set aside.

IT IS ORDERED.

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 7th day of April, 1975.

Commissioner of Education